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THE LAW OF ESCAPE IN CIVIL ACTIONS.

I. Of the Commitment.

1. *What is a legal commitment.*—As a general rule, a legal commitment must be made under the authority of a court of competent jurisdiction, and such is *prima facie* the authority under which the sheriff or other officer holds in custody a person committed under it, even though the commitment itself be invalid and eventually quashed through error in the proceedings. It is the duty of the officer to obey any precept which appears on its face to have issued from competent authority and with legal regularity: *Watson* v. *Watson*, 9 Conn. 140, s. p. *Roth* v. *Duvall*, 1 Idaho 167; *Cody* v. *Quinn*, 6 Ired. L. (N. C.) 191. Where the order of the court committing a defendant on a *ca. sa.*, who had failed to comply with the requisition of the act, required him to be taken into immediate custody and be detained without bail or mainprize until he pay off and discharge the full amount of principal, interest and costs: *Held*, that this order was sufficiently full and explicit to authorize the sheriff to confine the defendant in the common jail of the county: *The Governor, for use, &c.*, v. *Kemp et al.*, 12 Ga. 466. The suffering a person committed by competent authority to go at large is an escape, for it is not for the sheriff to judge of the validity of the process or other proceedings of such court. The law, therefore, allows him, in an action for false imprisonment, to plead such authority, which will excuse him, though it be erro-

neous. But if the court had no jurisdiction over the matter, then all is void *ab initio*, and the officer would not be liable for the escape of a person taken into custody upon such void authority; and even if, from the copy left with the jailer, the commitment appears void, the jailer is not liable: *Kidder* v. *Barker*, 18 Vt. 454. The distinction is laid down in Moore 274; Dyer 175; Poph. 203; Leon. 30; 5 Co. 64; 8 Id. 141 b; 10 Id. 76 a; Cro. Jac. 3, 280, 289; 2 Bulst. 64, 256; 2 Saund. 100, 101; 3 Mod. 325; Carth. 148, 234. Even though the *capias ad satisfaciendum* upon which a defendant is taken were irregularly issued, without a previous *fieri facias*, or more than a year after the judgment without a *scire facias*, it is nevertheless sufficient authority for the sheriff to make the arrest. Indeed no irregularity in the issuing of the process will excuse him: *Scott* v. *Shaw*, 13 Johns. 378; *Hinman* v. *Prees*, Id. 529; *Bissell* v. *Kip*, 5 Id. 89; *Ontario Bank* v. *Hallett*, 8 Cowen 192; *Jones* v. *Cook*, 1 Id. 309 *g*. Also, see *Shirley* v. *Wright*, 2 Ld. Raym. 775; 1 Salk. 273; 2 Id. 700, S. P.

A sheriff cannot excuse himself from execution of process because it is irregular or erroneous, but only where it is absolutely void: *Stoddard* v. *Tarbell*, 20 Vt. 321; *Howard et al.* v. *Crawford, for use, &c.*, 15 Ga. 423; *Woodruff* v. *Barret*, 15 N. J. L. (3 Green) 40; *Stevenson* v. *McLean*, 5 Humph. (Tenn.) 332. A jailer is bound to receive persons committed by the authority of the United States, and to keep them until discharged by due course of the laws of the United States: *Johnson* v. *Lewis*, 1 Dana (Ky.) 182.

2. *Form of commitment.*—The sheriff cannot be charged with an escape before he had the defendant in his actual custody by a form of commitment issued by a legal authority, such as has been defined, provided he has done all in his power to arrest him: Brooke on Escape 22; 3 Bac. Abr. 395. Neither can he be charged with an escape if, having arrested a person on Sunday, contrary to the 29 Car. 2, c. 7 (where that statute prevails), and which would not, therefore, be a legal commitment, he lets him go again. Vide 6 Mod. 95; Salk. 78. But a sheriff, acting under the authority of a court having competent jurisdiction, is not liable for any irregularity and mistake in the exercise of that jurisdiction: *Brown* v. *Mason*, 40 Vt. 157; or for any irregularity or error in any process under which he is required to act, provided such process emanate from a court having jurisdiction: *Price* v. *Holland*, 1 Patt. & H. (Va.) 289.

II. What is deemed an Escape.

1. An escape may consist either in the deliverance of a person, who is lawfully imprisoned, out of prison, before such person is entitled to such deliverance by law (5 Mass. 310), or in the voluntarily and negligently allowing any person lawfully in confinement to leave the place: 2 Bishop Cr. L., § 917. Permitting a prisoner to leave the place of imprisonment, even for the shortest time, before such delivery by law, constitutes an escape: 9 Johns. 329; *Palmer* v. *Hatch*, Sewell on Sheriffs 440; *Jones* v. *Cook*, 1 Cowen 300; and this is so, even though the debtor return into custody and is in court on the return day: *United States* v. *Brent*, 1 Cranch C. C. 525. See also *United States* v. *Williams*, 5 Id. 619. But the officer is not liable for the escape of a debtor whom he has arrested on insufficient process: *Hitchcock* v. *Baker*, 2 Allen (Mass.) 431. A voluntary escape, whether from the jail or from the liberties thereof, or even the voluntarily granting the prisoner more liberty than authorized by law, will not be purged by the prisoner's voluntary return to the jail or its liberties, or even by his recapture, without affirmance by the plaintiff: 3 Rev. Stats., 5th ed., 736, §§ 84 and 85; *Drake* v. *Chester*, 2 Conn. 473; *Wesson* v. *Chamberlain*, 3 Coms. 331; 1 Salk. 272. There is a distinction between a voluntary and a negligent escape in civil actions, in respect to the rights and liabilities of the sheriff suffering such escape, but the distinction does not prevail in criminal cases: *Tillman* v. *Lansing*, 4 Johns. 45; Sewell 441. In Missouri a sheriff is liable as well for a negligent as for a voluntary escape: *Warburton* v. *Wood*, 6 Mo. 8; but this is by statute, the 52d section of the Act of the General Assembly (R. C. 1835, p. 260); otherwise it is established law that fresh pursuit and recaption before action brought is a good defence against a demand for a negligent escape. But it has been decided in this same state that a sheriff is not liable for a negligent escape, if his attention to his duty has been diverted from time to time by the plaintiff: *State* v. *Woods*, 7 Mo. 536. In North Carolina the officer is liable absolutely in the case of a voluntary escape, but in the case of a negligent escape he has a right to retake the prisoner, and if he do retake him on fresh pursuit he is not liable to an action brought after such recaption and when he has the prisoner in custody: *Adams* v. *Turrantine*, 8 Ired. 147 (Rev. Code, c. 105, § 20). But the action lies for a negligent escape, even though there be no actual negligence: Id. The

meaning of the term "negligent escape" is the same as that given at the common law. In the case of a voluntary escape, the sheriff cannot retake the prisoner even upon fresh suit; and if he does, the prisoner may have an action of trespass against him: Carter 212; 2 Wils. 295; 5 Term Rep. 25. But this must be understood of custody in execution, for if the prisoner be in custody on mesne process, the sheriff may retake him after having permitted him to go at large: *Atkinson* v. *Matteson*, 2 Term Rep. 172; *Lewis* v. *Morland*, 2 B. & Ad. 56. Also, if a person arrested on mesne process be rescued, the sheriff, upon returning the rescue, is not answerable for the escape, for he is not, in this case, bound to raise the *posse comitatus*. But after an arrest upon a *capias ad satisfaciendum*, the sheriff cannot effectually return a rescue, for it is his duty at the time to raise the *posse comitatus*, if needful. In this case, therefore, an action lies for an escape (*State* v. *Lowry*, 8 Mo. 48), for the return of an ineffectual execution is as none. See 3 Bac. Abr. 404. In South Carolina, although the sheriff is not bound by law to maintain a prisoner confined on mesne process, yet if he suffer such prisoner to go at large, because he was destitute, and the plaintiff refused to pay for his maintenance, the sheriff is nevertheless liable (NOTT, J., dissenting): *McLain* v. *Hayne*, 1 Treadway Const. Rep. 212.

An escape is voluntary when it is with the assent of the officer having the prisoner in custody. And it is negligent when such escape is without the knowledge or assent of such officer: Crocker on Sheriffs 282, c. 35, § 1. Where a sheriff discharges a debtor on a bail bond, which proves to be a forgery as to the signature of the bail, this is a *voluntary* escape, and the sheriff is liable though ignorant of the forgery: *Conyers* v. *Rhame*, 11 Rich. 60. And where a witness states that while he was at breakfast a prisoner who was in custody of the sheriff "made his escape" the fair inference is that the prisoner fled from the custody of the sheriff against consent of the latter: *Howard et al.* v. *Crawford, for use, &c.*, 15 Ga. 423. It may here be mentioned that the statutes of 13 Edw. 1, c. 2, and 1 Rich. 3, c. 12, giving a creditor an action of debt against a sheriff who shall wilfully or negligently suffer a debtor to escape, are not in force in Georgia: Id. In fact every liberty given to a prisoner which is not authorized by law is an escape: *Colby* v. *Sampson*, 5 Mass. 310; *Lowry* v. *Barney*, 2 D. Chip. (Vt.) 11; *Commonwealth* v. *Drew*, 4 Mass. 391; *Clap* v. *Cafran*,

7 Id. 101; *Bartlet* v. *Willis*, 3 Id. 107; 18 Johns. 48; 9 Id. 329; 13 Id. 366; 5 Id. 115; 15 Id. 152; 3 Binn. 404; *Koomes* v. *Maddox*, 2 Har. & G. 106; *Jones* v. *The State, &c.*, 3 Har. & Johns. 559. And every person in prison by process of law is to be kept *in salva et arcta custodia*: Plowd. 36; 3 Co. 44; 2 Inst. 381; Rol. Abr. 806. It is therefore an escape if the prisoner is permitted to occupy the parlor or sitting room of the sheriff though under the same roof as the common jail: *People* v. *Stone*, 10 Paige (N. Y.) 606.

In Indiana, an action for debt lies against sheriff for an escape on execution, the English statutes being in force there: *Gwinn* v. *Hubbard*, 3 Blackf. 14. The sheriff is also liable though there be no jail in the county. In Virginia, under the statute, an action of debt may be maintained against a sheriff for either wilful or negligent escape, and to defeat the action the defendant must show that the escape was tortious and that fresh pursuit was made: *Stone* v. *Wilson*, 10 Grattan (Va.) 529. In North Carolina, where a sheriff voluntarily permits a prisoner to escape, the sheriff is liable for the debt, even though he may afterwards retake the prisoner: *Lush* v. *Ziglar*, 5 Ired. (N. C.) L. 702. In Maryland, before the Act of 1811, c. 161, if the sheriff made an arrest under a *capias* on final process, and suffered the party arrested to escape, he could not again arrest the same party on the same process without rendering himself liable to an action for false imprisonment. This disability was removed by the Act of 1811, c. 161, § 2, and by it power was conferred on the sheriff to make a second arrest by virtue of the same process; but this act did not protect the sheriff from liability to the plaintiff for an escape: *State* v. *Lawson*, 2 Gill. 62. See Const. 1864, art. 3, § 37.

2. If by color of a writ of *habeas corpus* the sheriff or other officer having the custody of a prisoner, suffer him to go at large, it is an escape: Hob. 202; 3 Co. 44; Cro. Car. 14; *People* v. *Stone*, 10 Paige (N. Y.) 606. It has also been adjudged that if the sheriff suffer the prisoner to go at large between the issue and the return of the writ of *habeas corpus*, even though the prisoner appeared at the return of the writ, it is an escape: Hard. 476; agreed by HALE, Chief Baron, and the whole court. And yet in *Boyton's Case* it was *held* (3 Co. 44), that where the prisoner on his way to court, but before the day when the writ is returnable, goes of his own head and without any keeper away from the sheriff's custody,

but returns the next morning so that at the return of the *habeas corpus* the sheriff delivers him into court, this is no escape. But this was admitted to be a favorable construction of law, the prisoner having escaped into another county out of the sheriff's jurisdiction.

The rule that a ministerial officer is protected by the writ of a competent court, good on its face, is a rule of protection merely, and is personal to the officer: *Tuttle* v. *Wilson*, 24 Ill. 553.

If the defendant escape at any time *after* the return day of the writ, and before execution, the sheriff is liable, whether the escape be voluntary or negligent: *Stone* v. *Woods*, 5 Johns. (N. Y.) 182. The removal of a prisoner having the liberties of the jail from the limits thereof, by virtue of a valid legal process which affords justification to the officer taking him thence, is not an escape within 2 Rev. Stat. 473, § 63, 1864; *Wickens* v. *Willet*, 4 Abb. (N. Y.) App. Dec. 596. But the taking a prisoner, by virtue of a *habeas corpus*, out of the shortest and most convenient route, though the sheriff produces the prisoner at the return of the writ, is an escape: *People* v. *Stone*, 10 Paige (N. Y.) 606.

Upon the whole, it has long been settled both here and in England that taking a prisoner, who was imprisoned on execution in a civil suit, away from the prison or jail liberties on a *habeas corpus ad testificandum*, to testify, was no escape: *Noble* v. *Smith*, 5 Johns. 359; *Hassam* v. *Griffin*, 18 Id. 48; *Wattles* v. *Marsh*, 5 Cowen 176; *Martin* v. *Wood*, 7 Wend. 132; 3 Esp. Cas. 283; 3 Burr. 1440; 4 East 587. And this even though the sheriff take the prisoner out of his county but returns with him again without any unnecessary delay: *Hassam* v. *Griffin*, 18 Johns. 48.

3. *Constructive escape.*—Constructive escapes are such as take place when the prisoner obtains more liberty than the law allows, although he still remains in confinement: Bac. Abr. *Escape* (B.); Plowd. 17; 5 Mass. 310; 2 Mason C. C. 486. The following cases are examples of such escapes: when a man marries his prisoner: Bac. Abr. *Escape* (B.) 3; Plowd. 17; if an underkeeper be taken in execution and delivered at the prison, and neither the sheriff nor any authorized person be there to receive him: *Colby* v. *Sampson*, 5 Mass. 310; and where the keeper of the prison made one of the prisoners confined for debt a turnkey, and trusted him with the keys: *Wilkes* v. *Slaughter*, 3 Hawk. 211; *Skinner* v. *White*, 9 N. H. 204; *Steere* v. *Field*, 2 Mason 486; *Gage* v. *Graffam*, 11 Mass. 101; *Day* v. *Brett*, 6 Johns. 22.

And according to the statute law of England (8 & 9 W. 3, c. 27, § 8) "if the marshal or warden for the time being, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisoners, shall after one day's notice in writing given for that purpose, refuse to show any prisoner committed in execution to the creditor at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be an escape in law."

4. *Voluntary escape.*—It was formerly held that where the sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was in such case absolutely discharged from the creditor, and that the right of action was entirely transferred against the sheriff, who by means of such escape became *debitor ex delicto*: 3 Bac. Abr. 403; *Arundell* v. *Wytham*, Leon. 73; S. P. per HOBART in the *Sheriff of Essex's Case*, Hob. 202. But latter decisions have been contrary, and it has been since adjudged in numerous cases that where a sheriff suffered a voluntary escape, the plaintiff might have a new action of debt or *scire facias quare executionem non* against the prisoner: *Allanson* v. *Butler*, Sid. 330; *Buxton* v. *Home*, Show. 174; *Basset* v. *Salter*, 2 Mod. 136; *James* v. *Pierce*, Vent. 269; *Compton* v. *Ireland*, 1 Mod. 194; *Sudal* v. *Wytham*, 2 Lutw. 1264; *Appleby* v. *Clark*, 10 Mass. 59; *Brown* v. *Getchell*, 11 Id. 11; *Commonwealth* v. *Drew*, 4 Id. 391; *Cheever* v. *Merrick*, 2 N. H. Rep. 376.

In Connecticut, if a debtor in prison on execution immediately goes out of jail, on taking the poor debtor's oath, with the consent of the jailer, it is a voluntary escape: *Wells* v. *Lindsey*, 2 Root (Conn.) 481; *Bowen* v. *Huntingdon*, 3 Conn. 423. But the mere employment of a prisoner by the jailer to render certain services in connection with the care of the jail, and even being sometimes intrusted with the keys, such services being rendered under the immediate supervision of the jailer and all within the prison liberties, has been held not to constitute a voluntary escape: *Bolton* v. *Cummings*, 25 Conn. 410. Where an officer, having arrested a prisoner on a warrant, left him upon his promise to follow him, and the prisoner escaped and was not overtaken by the constable, *held*, that this was a voluntary escape, and although the prisoner was afterwards arrested on a bench warrant the constable was nevertheless held liable: *Olmstead* v. *Raymond*, 6 Johns. (N. Y.) 62. Where a sheriff discharges a prisoner on a bail bond, which proves

to be forged, though the sheriff was ignorant of the forgery, this constitutes a voluntary escape: *Conyers* v. *Rhame*, 11 Rich. (S. C.) 60. But a sheriff is not liable for a voluntary escape after he has taken a bond for the prison limits: *Lyle* v. *Stephenson*, 6 Call (Va.) 54. It is sufficient evidence, *prima facie*, to charge a sheriff with an escape that the prisoner was seen at large walking in the streets: *Steward* v. *Kip*, 7 Johns. (N. Y.) 165. There is this difference between a voluntary and a negligent escape. For if a sheriff suffer a prisoner to go at large, the sheriff cannot retake him even upon fresh suit, and if he does the prisoner may have an action of trespass against him: Carter 212; 2 Wils. 295; 3 T. R. 25; *Tillman* v. *Lansing*, 4 Johns. 47; *Peters* v. *Henry*, 6 Id. 123; *Richmond* v. *Tallmadge*, 16 Id. 307. But this must be taken with limitation, for if the prisoner be in custody on mesne process the sheriff may retake him notwithstanding his permission: *Attkinson* v. *Matteson*, 2 T. R. 172; *Lewis* v. *Moreland*, 2 Barn. & Ad. 56. But in North Carolina, the sheriff remains liable for the debt even though he may afterwards retake the prisoner: *Lush* v. *Ziglar*, 5 Ired. (N. C.) L. 702. The South Carolina Act of 1788 is express that the sheriff shall be ultimately liable for an escape: *Clark* v. *Moore*, 3 Brev. (S. C.) 62.

5. *Negligent escape.*—A negligent escape takes place when the prisoner goes at large unlawfully, either because the building or prison in which he is confined is too weak to hold him: *Parsons* v. *Lee*, Jefferson's Rep. 50; *Smith* v. *Hart*, 1 Brevard 146; or because the keeper, by carelessness, lets him go out of prison. The prisoner may, in the case of a negligent escape, be retaken: 2 Bouv. Inst. 2335. And a jailer shall be excused for a negligent escape, if he retakes upon fresh pursuit: H. P. C. 114; Dub. 6 H. 7, 11; 10 H. 7, 25, 28 [3 Com. Dig. 571 (A 2)]. The escaping of a prisoner who has the liberty of the yard, upon bonds, is a negligent escape: *Jones* v. *Abbee*, 1 Root (Conn.) 106; *Abel* v. *Bennett*, Id. 127. Where the sheriff arrested a defendant and released him by taking bond for his appearance at court, to take the benefit of the act for the relief of honest debtors, in an amount less than twice the amount of the creditor's demand, the bond being taken in good faith by the sheriff: *Held*, that he was guilty of a negligent escape, and might retake the defendant in a *ca. sa.* and surrender him in court: *Colley* v. *Morgan*, 5 Ga. 178. Every escape is, in the eye of the law, a negligent escape, which does not

happen by the hand of God or public enemies: *Warburton* v. *Woods*, 6 Mo. 8. In Missouri a sheriff is liable for a negligent, as well as for a voluntary, escape: Id. Also, in Virginia: *Stone* v. *Wilson*, 10 Gratt. (Va.) 529; 54th section of the Act of the General Assembly (R. C. 1835, p. 260). By the statutes of North Carolina, which use the terms "escape," "voluntary," and "negligent," in their common-law sense, there are three kinds of escape: 1. *Voluntary* escape, in which the sheriff permits the prisoner to go at large, and in which there is no defence to an action of debt on his official bond. 2. *Negligent* escape, where the prisoner breaks out of prison, and is at large without the consent of the sheriff, to which, on action brought, the sheriff may plead a recapture on a fresh pursuit. 3. An escape effected by the act of God or the public enemies, on which no action of debt arises. In the second case, where there has been no recapture on a fresh pursuit, an action of debt against the sheriff may be sustained: *Adams* v. *Turrentine*, 8 Ired. (N. C.) L. 147; *Mabry* v. *Turrentine*, Id. 201.

6. *Escape on mesne process.*—If a sheriff suffer a prisoner arrested on mesne process to escape, an action lies against him, both at common law and by statute, from the delay and prejudice resulting therefrom: 2 Rol. Abr. 99, 807; *Broby* v. *Lumley*, Moore 852; Cro. Eliz. 623, 652, 868; Cro. Jac. 280; and in England, by statute also, 8 & 9 W. 3, c. 26 (2 Bl. Rep. 1049). After an arrest on mesne process, the jailer may suffer the prisoner to go at large, provided he has him at the return of the writ. In Noy 72, a distinction is taken, that in actions for escape on mesne process the writ surmises that *ad largam ire permisit et non comperuit ad diem;* but on process of execution *ad largam ire permisit* is sufficient. Also, upon an arrest on mesne process, the sheriff is obliged to take bail by the statute 23 Hen. 6, c. 10; but such was not required by the common law. The effect of a voluntary escape, if the prisoner was confined on mesne process, is that he may be again arrested, and no action will lie against the sheriff: *Swepson* v. *Whitaker*, 1 Haywood (N. C.) 225 (257); 2 Bouv. Inst. 2334. No action will lie for an escape on mesne process, if the sheriff has the body in court at the return of the writ: 1 Saund. 35, n. 1; Tidd's Pract. 207 and 255. And in an action for an escape on mesne process the declaration must allege that the defendant in the original suit did not appear at court: 2 Chitty Pl. 299 A, Prec. 289. See *Cady* v. *Huntington*, 1 N. H. 138, where

RICHARDSON, C. J., states that the English *ca. sa.* is the same as in that state: also, *Stone* v. *Woods*, 5 Johns. 182. Although an action lies against the sheriff (for an escape on mesne process), both at common law and by statute, as before mentioned, yet a sheriff is not guilty of an escape by omitting to take a prisoner on mesne process to jail before the return of the writ, nor yet after, unless the plaintiff is thereby delayed: 5 Term Rep. 37; 2 Id. 172. After an arrest on mesne process, officer having suffered a voluntary escape may retake prisoner: *Arnold* v. *Stuves*, 10 Wend. 514.

7. *Escape on final process.*—If a defendant, when in execution, be afterwards seen at large, for any the shortest time, even before the return of the writ, the sheriff will be chargeable for an escape; for it is his duty to obey the writ, and the writ commands him to take the defendant and him safely keep, so that he may have him ready to satisfy the plaintiff: 3 Bac. Abr. 404. The escape of a defendant in execution (or final process) remits the plaintiff to all his former rights, and the imprisonment is no longer a satisfaction: *McGunity* v. *Herrick*, 5 Wend. 240, *g*; 3 Bac. Abr. 405.

In New York, if a constable, who has a prisoner in custody by virtue of an execution from the justice's court, discharges him even by order of the justice, who has no authority for that purpose from the plaintiff, it is an escape for which the constable is liable: *Van Shych* v. *Taylor*, 9 Johns. (N. Y.) 146. A deputy sheriff, having arrested a defendant on execution, left him in charge of the defendant's two brothers until next day, when he took him to jail: *Held*, to be an escape, the persons in whose custody defendant was left having no authority to retain him: *Palmer* v. *Hatch*, 9 Johns. (N. Y.) 329. Permitting the defendant to go at large, even with the consent of the plaintiff's attorney, acting under his general authority, the sheriff knowing that the judgment had not been satisfied, is an escape for which the sheriff will be liable: *Kellogg* v. *Gilbert*, 10 Johns. (N. Y.) 220. The removal of a defendant, who had been arrested on an execution, out of the county in which he had been arrested, has been held to constitute an escape: *McGruder* v. *Russell*, 2 Blackf. (Ind.) 18.

8. *What is not an escape.*—It will not be an escape if the party never was in the sheriff's custody, as if the old sheriff does not deliver him over upon such execution: 3 Co. 72; 2 Cro. 588; Poph. 85; 2 Leo. 54; *Partridge* v. *Westervelt*, 13 Wend. (N.

Y.) 500. If he be arrested but not actually committed to jail, the jailer shall not be charged with an escape: 1 Rol. Abr. 806, l. 30. If the prisoner be at the house of the jailer, but not within the prison: Cro. Car. 210. Or if he were not in custody at the suit of the plaintiff, as if he were taken by a *capias utlagatum* or a *capias pro fine*, where a *capias* does not lie in such a suit: 1 Rol. Abr. 810, l. 30; 1 Leo. 263. Or was arrested and suffered to go at large before the writ of execution delivered to the sheriff, 1 Rol. Abr. 809, l. 30, it will not be an escape. But no objection to the process which does not prove the process void will excuse an escape: Lord Ray. 775. Hence, the officer is not liable for the escape of a prisoner arrested on insufficient process: *Hitchcock* v. *Baker*, 2 Allen (Mass.) 431. So it will not be an escape if the prisoner goes out of prison by reason of a sudden fire in the jail: 1 Rol. Abr. 808, l. 7. Or the jail be broken by the king's (or country's) enemies: Brooke on Escape 10; 1 Rol. Abr. 808, l. 5. Or the defendant be rescued upon mesne process before he was in jail: Mar. 1; 1 Rol. Abr. 807, l. 35; 2 Cro. 419; 2 Lev. 144; 1 Rol. Abr. 389, 440. So if the defendant be retaken upon fresh suit before the action commenced for the escape: 1 Rol. Abr. 808, l. 50; 3 Cro. 52; 2 Godb. 434; F. N. B. 130, B. [Com. 422]. Though he was out of sight. Though the fresh suit was not begun till a day and a night after the escape, and though the sheriff did not retake him till he fled into another county. Though he was not retaken till seven years after, if it was upon fresh pursuit: 13 Edw. 4, 9 a.; Semb. Godb. 177. So if the prisoner goes out of prison with the assent of his creditor, though the assent be only by parol, it will not be an escape provided the parol assent be not given after a previous escape. Nor yet if the sheriff upon *habeas corpus* brings his prisoner to court though he goes out of the direct way. Nor if a prisoner, brought by *habeas corpus*, goes out of the custody of the sheriff but returns the next morning and appears at the return of the writ: *Hassam* v. *Griffin*, 18 Johns. 48. Neither is it an escape to take a prisoner in execution to a lockup house. See Com. Dig. 581, 1–2, (D.).

If the court set aside its execution after arrest, a discharge is not an escape: *Pinkney* v. *Hageman*, 53 N. Y. 31.

The following cases have been adjudged applying the ancient rules of *non escape* to the varied and altered circumstances of modern times. It will not, as before mentioned, be an escape if

the party never was in the sheriff's custody: as if the old sheriff does not deliver him over upon such execution; the right of the old sheriff to assign over the prisoner, on civil execution, to his successor, being for his own security and benefit, and may be waived by him: *Hempstead* v. *Weed*, 20 Johns. (N. Y.) 64. The R. S. (N. Y.) have not changed the law on this subject; formerly the assignment of prisoners was at the old sheriff's election, now it is made, by statute, his duty; but until assignment the prisoners continue in his custody. If a party be arrested but not actually committed to jail, the jailer shall not be charged for an escape, even though the prisoner, who had given bond to be a true prisoner, be lodged for the night in a house provided by the county for the use of prisoners, but the jailer exercising no control over the house or the prisoners: *Jacobs* v. *Tolman*, 8 Mass. 161. In Cro. Car. 210 (before referred to), it is said to be no escape if the prisoner be at the house of the jailer though not within the prison. But in *Burns* v. *Brian*, 1 Spear (S. C.) 131, this must be taken with the proviso that the debtor be not permitted to be *without the prison walls* without lawful authority.

Where the debtor was on the same day committed to jail on two executions, at the suit of the same creditor, upon each of which commitments he executed a bond with sureties for the liberty of the prison yard, and within thirty days of the said commitments executed to the jailer but one assignment for the benefit of his creditors: *held*, that he had complied literally and substantially with the requirements of sec. 4, c. 197, of R. I. Rev. Stat., and although he did not return to close jail within the said thirty days had committed no escape upon either of his said bonds: *Farrington* v. *Allen*, 6 R. I. 449. A debtor's fraudulently conveying his property in trust and then taking advantage of the oath prescribed by law for the relief of poor debtors, in Rhode Island, although a discharge of the debt, is not an escape so that an action can be maintained on a bond for the liberty of the prison yard: *Ammidon* v. *Smith*, 1 Wheat. 447. A prisoner is not guilty of an escape by rendering himself at a place beyond the limits of the prison for the purpose of taking the poor debtor's oath: *Commonwealth* v. *Alden*, 4 Mass. 388. Neither is a sheriff liable for an escape in taking a prisoner, arrested on execution, out of the direct route to the jail in order to give him the opportunity of obtaining some necessary apparel and seeing his wife; such being no more than a

reasonable indulgence prompted by laudable and compassionate motives: *Wood* v. *Turner*, 10 Johns. (N. Y.) 420. Where a defendant has given bail in one cause to appear and answer, and is subsequently arrested in another cause, but is taken on *habeas corpus* before the justice in the first cause, to save the surety from his liability: *Held*, that the sheriff was not liable for an escape: *Martin* v. *Wood*, 7 Wend. (N. Y.) 132.

Where a prisoner, who had given bonds for the limits, is arrested within the limits, by order of the House of Representatives, and is carried out of the limits without his consent, but when released returns as soon as possible, such absence is no escape for which the sheriff is liable: *Wickelhausen* v. *Willett*, 12 Abb. (N. Y.) Pr. 319; 21 How. Pr. 49; 10 Abb. Pr. 164.

The following cases have, in addition, been held not to constitute an escape:—

Going into the jail yard in the night-time, for purposes indispensably necessary, when there were no accommodations within the jail: *Partridge* v. *Emmerson*, 9 Mass. 122; but see *McLellan* v. *Dalton*, 10 Mass. 190, where the decision depended upon the meaning of the statute of 1784, c. 41, § 8. If the door of a prison, in which a debtor is confined under a *ca. sa.*, is permitted to remain open, the debtor not leaving the prison, there is in such case no constructive escape: *Currie* v. *Wortley*, 2 Jones (N. C.) L. 104. In the course of the judgment, the court expressed an opinion that the doctrine of constructive escapes had already been carried sufficiently far: *Per cur.* The statute 13 Edw. 1, c. 1—Rev. Stat., c. 109, § 20—gives a creditor an action of debt against a sheriff, who shall *wilfully* or *negligently* suffer a debtor to escape; but no constructive escape is within the act.

By an Act of Congress (c. 208), passed March 29th 1871, it is enacted, by section 1, that "whenever any person, who may be indicted for any criminal offence, shall be held by any sheriff upon or by virtue of any order, writ or process, issued in any civil action or proceeding, the court in which such indictment may be pending may, upon *habeas corpus* or by order, take such person out of the custody of such sheriff, and make such disposition of the prisoner as such court shall see fit. And it shall be the duty of such sheriff to obey such writ or order and to make such disposition of such prisoner as the court may direct; and such disposition of such prisoner shall not be deemed an escape, and no suit, action

or proceeding shall be allowed or maintained against such sheriff, for or by reason of his having obeyed any such writ or order." By section 2 it is enacted that "this act shall take effect immediately." The sheriff is not liable for a mere involuntary escape, as where the prisoner accidentally or involuntarily goes beyond the liberties, bounded only by an imaginary line, and returns immediately, before action brought: *Ballon* v. *Kip*, 7 Johns. (N. Y.) 175; *Kip* v. *Babcock*, Id. 178; *Peters* v. *Henry*, 6 Id. 121.

HUGH WEIGHTMAN.

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(*To be continued.*)

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY *v.* C. C. HIGGINBOTHAM, ADMINISTRATOR OF MARTHA J. DAY.

A policy of life insurance having been determined by the failure to pay the premium falling due July 16th, the insured, on October 1st, applied for a reinstatement of the policy, gave a physician's certificate as to his health and paid the premium to an agent, who forwarded the application and certificate to the company; the company reinstated the policy and sent its receipt, dated as of the preceding July 16th, to the agent, who, on October 14th, delivered it to the insured: *Held*, that the representation of the insured as to his health on October 1st was not continuous, and that in the absence of any representations on the 14th, a failure to communicate any change of condition of health between the 1st and that date did not constitute a misrepresentation.

The preliminary proofs presented to an insurance company, in compliance with the conditions of the policy, are admissible as *prima facie* evidence of the facts stated therein against the insured.

An admission must be taken as an entirety, with its qualifications making for, as well as against, the party making it.

Insurance Co. v. *Newton*, 22 Wall. 32, followed.

IN error to the Supreme Court of the District of Columbia.

This was an action by Mrs. Martha J. Day against the Mutual Benefit Life Insurance Company, incorporated by the state of New Jersey, to recover the amount of a policy of insurance, issued to Mrs. Day upon the life of her husband, Dr. Richard H. B. Day, of Washington, in which judgment was rendered against the company for the amount insured, $5000, and interest.

The policy, dated the 16th of July 1869, was for life, and stipulated for the payment of the annual premium of $137.50, on or